

PHASE II
EXECUTED COPY

PHASE II CONTRACT BETWEEN THE CITY OF
BOSTON AND TRINITY MATTAPAN HEIGHTS LIMITED
PARTNERSHIP PURSUANT TO CHAPTER 121A, SECTION 6A
OF THE MASSACHUSETTS GENERAL LAWS

Redevelopment of the Boston Specialty and Rehabilitation Hospital Campus, Mattapan

This contract (this "Phase II Contract") is made as of this 19th day of August 2004, under Sections 6A, 10, 15 and 18C of Chapter 121A of the General Laws of The Commonwealth of Massachusetts, by and between TRINITY MATTAPAN HEIGHTS LIMITED PARTNERSHIP, a Massachusetts limited partnership (the "Initial Developer" and "TMHLP"), and the CITY OF BOSTON, a municipal corporation of The Commonwealth of Massachusetts (the "City"), acting pursuant to General Laws Chapter 121A, Section 6A and 10 and every other power and authority.

WITNESSETH THAT:

WHEREAS, an application dated April 26, 2004 (the "Application") was filed by TMHLP with the Boston Redevelopment Authority (the "Authority") under the provisions of Chapter 121A and Chapter 652 (collectively, "Chapter 121A") for approval of the second phase of the redevelopment of the former Boston Specialty and Rehabilitation Hospital Campus, located in the Mattapan District of the City of Boston, Suffolk County, Massachusetts, through the redevelopment of Buildings A, B, C, D and I (the "Project Area"), for affordable housing; and

WHEREAS, the redevelopment project which is the subject of this Phase II Contract (the "Project"), is the subject of a ground lease dated as of August 11, 2004, executed by BPHC Mattapan Development Corp., Inc., an affiliate of the City of Boston Public Health Commission ("BPHC"), as landlord, and TMHLP, as tenant (the "Ground Lease"); and

WHEREAS, the Authority approved the Application by a vote on June 3, 2004, adopting a Report and Decision (the "Report and Decision"); and

WHEREAS, the Mayor of the City (the "Mayor") approved the above votes of the Authority on June 8, 2004; and

WHEREAS, the vote of the Authority and the approval of the Mayor with respect to the Report and Decision were filed with the City Clerk of the City of Boston on June 10, 2004, and such approval became final and binding pursuant to the provisions of Chapter 121A; and

WHEREAS, in accordance with the Report and Decision, TMHLP has entered into a Regulatory Agreement with the Authority of even date with respect to the development of the Project (the "Regulatory Agreement").

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. **Operation of the Project.** TMHLP shall carry out the Project in accordance with, and subject to, the provisions of Chapter 121A and 652, the provisions of the Report and Decision, and the provisions of the Regulatory Agreement with the Authority, as it may be amended from time to time.
2. **Term.** This Phase II Contract shall become effective on the date of recording of a notice of lease of the Ground Lease with the Suffolk County Registry of Deeds (the "Effective Date") and shall remain in effect for a period of forty (40) years from the Effective Date.
3. **Notice of Lease.** As soon as the Ground Lease is executed by TMHLP and the BPHC, TMHLP shall record a Notice of Lease at the Suffolk Registry of Deeds. TMHLP shall provide a copy of said recorded Notice of Lease to the Authority and the Commissioner of Assessing for the City of Boston within ten (10) days of its recording.
4. **Excise Tax Payments.** TMHLP shall pay to the Department of Revenue, or any successor department or agency of The Commonwealth of Massachusetts ("DOR"), with respect to each calendar year that this Phase II Contract is in effect, the Urban Redevelopment excise required under Chapter 121A, Section 10, as amended from time to time (the "Excise Tax"). Every calendar year TMHLP shall provide to the City copies of cancelled check(s) sent to the DOR that related to the Excise Tax.

The City acknowledges that, notwithstanding the fact that TMHLP does not hold a fee simple interest in the land comprising the Project Area, TMHLP's ground lease interest coupled with its fee simple ownership of the improvements thereon represents the full real estate value of the Project and, accordingly, the land is not to be taxed separately from the improvements and ground lease interest under General Laws Chapter 59 ("Chapter 59").

5. **6A Contract Payments.**
 - a. *Amount:* For calendar year 2004 and 2005 the amount of the 6A Contract Payment shall be Five Thousand (\$5,000) Dollars and Ten Thousand (\$10,000) Dollars respectively; provided, however, that if the Project receives income during calendar year 2005 the 6A Contract Payment shall be equal to 10% of Gross Income, less amounts actually paid under Section 10 of Chapter 121A to DOR. Beginning with calendar year 2006 the 6A Contract Payment shall be equal to 10% of Gross Income, less amounts actually paid under Section 10 of Chapter 121A to DOR. Notwithstanding the preceding sentence, TMHLP may deduct an amount equal to 2% of Gross Income from the section 6A Contract Payment, but in no event more than the actual amount spent for maintenance or Eighty Thousand (\$80,000) Dollars, which ever is less; provided TMHL certifies

to the City the costs actually incurred and paid by TMHLP for the maintenance of property owned by the BPHC during the calendar year, with an accompanying acknowledgement by BPHC, the Department of Neighborhood Development of the City of Boston or another City agency acceptable to the Commissioner of Assessing. The percentage TMHLP will be able to deduct will depend on the actual amount expended in maintenance costs during each calendar year.

- b. *Due Date:* The 2004 6A Contract Payment is due within 30 days after the Effective Date of this Phase II Contract. Thereafter, each 6A Contract Payment shall be due on or before April 1 following the end of each calendar year for which such a payment is due.
- c. *Partial Payments:* 6A Contract Payments shall be equitably pro rated for any partial year during the term set forth in Section 2.
- d. *Late Payments:* Late 6A Contract Payments and Gap Payments, or any portion thereof, shall bear interest at the rate allowed for in G.L. Chapter 60, as amended from time to time.

6. **Gap Payments.** Upon the termination of this Phase II Contract TMHLP shall pay or cause to be paid a gap payment to cover the time period between the termination date and the date the Project becomes taxable pursuant to General Laws, Chapter 59. The gap payment shall be equal to the 6A Contract Payment that would have been made for such period if the Project had remained subject to this Phase II Contract. The gap payment shall be paid within six (6) months following the month in which the Phase II Contract terminates. The Project thereafter shall not be subject to the obligations of Chapter 121A, enjoy the rights and privileges thereunder, or be subject to the terms, conditions, and obligations of this Phase II Contract; provided, however, the deviations and permissions granted by the Authority pursuant to the Original Report and Decision shall survive such termination and shall remain in effect.

7. **Overpayments.** Any Overpayment (as defined in Section 20) shall, at the election of the City, be refunded to TMHLP or applied to reduce the 6A Contract Payment due in the succeeding calendar year. TMHLP shall give notice to the City of the discovery of the alleged Overpayment within 30 days of the date the 6A Contract Payment was made. The notice shall be accompanied by supporting documentation, including but not limited to, ward and parcel number, the date payment was made to the DOR and/or the City, the amount of the 6A Contract Payment and/or the Excise Tax payment made, copies of cancelled checks, front and back, for both the DOR and the City.

The alleged Overpayment must not be due to TMHLP's failure to provide the financial information required by this Phase II Contract, or to inaccurate information provided by TMHLP. If the Overpayment is due to TMHLP's failure to provide required financial information or inaccurate information, the City shall not be obligated to refund any interest, late

fees, penalties or fines that may have been assessed by the Commonwealth of Massachusetts or the Collector-Treasurer. The City will not pay interest on any Overpayments.

8. **Delivery and Examination of Financial Statements.** TMHPL shall deliver the following financial documents:

- a. To the Commissioner of Assessing no later than February 10 following the end of each calendar year during which this Phase II Contract is in effect, (i) a statement of income and expenses for the Project during the preceding calendar year, or portion thereof, and (ii) a Declaration of Liability Return Valuation Form (available from the Assessing Department); and
- b. To the Commissioner of Assessing and the Collector-Treasurer of the City ("Collector-Treasurer") on or before April 1 of each calendar year during which this Phase II Contract is in effect, (i) a Declaration of Liability Form (available from the Collector-Treasurer), (ii) an audited report, prepared by a Certified Public Accountant, consisting of a statement of all rental and other income, operating costs, a statement of profit and loss, a balance sheet, and a statement of disposition of funds for the preceding year, (iii) a certified copy of TMHPL's Excise Tax Return as submitted to DOR, and (iv) certification by TMHPL of maintenance costs expended for maintenance of BPHC's property, with an accompanying acknowledgement by BPHC or the Department of Neighborhood of the City of Boston.
- c. Notwithstanding anything in the Phase II Contract to the contrary, the maximum "fair cash value" for the Project to be determined annually by the Assessing Department and certified to DOR under Chapter 121A, Section 10, the second and seventh paragraphs thereof, commencing in calendar year 2004 or portion thereof and succeeding calendar years, or portions thereof, thereafter shall be the amount which when used in calculating the Excise Tax under the applicable statutory formula produces an Excise Tax equal to or less than the Contract Amount defined in Section 5 above.
- d. TMHPL hereby authorizes the Commissioner of Assessing, or his or her representative designated in writing, to examine from time to time all Excise Tax returns and related documents or reports filed with DOR by TMHPL or its representative. No further evidence of this authorization is required.

9. **Determination of Fair Cash Value.** During the term specified in Section 2 the City of Boston Assessing Department shall determine the fair cash value of the Project in accordance with G.L. Chapter 121A, Section 10; provided, however, that if TMHPL does not file with the Commissioner of Assessing the financial information set forth in Section 8, the Assessing Department, at the sole discretion of the Commissioner of Assessing, may determine the "fair cash value" without regard to the limitations set forth in Section 9 of Chapter 121A.

10. **Amendments to Chapter 121A or Rules and Regulations.** Notwithstanding any language to the contrary in the Application or any other document entered into between the Authority and TMHLP, no amendment or modification of the terms and conditions of this Phase II Contract shall be binding on either party without the prior written consent of both parties.

11. **Collection and Enforcement.** TMHLP's failure to pay when due the 6A Contract Payment and/or the gap payment, or any portion thereof, shall give the City the right to (a) avail itself of the remedies provided for in G.L. Chapter 60 and/or (b) bring an action to recover unpaid 6A Contract Payments, plus any interest, fees or charges that may have accrued.

12. **Costs To Be Paid by TMHLP.** TMHLP shall pay for the following costs and expenses:

- a. The cost of having audited reports prepared by an independent certified public accountant; and
- b. The cost of having audited reports prepared if the City has reasonable cause to be dissatisfied with the audited reports submitted by TMHLP; and
- c. The cost of paying for an annual audit conducted by the Authority and/or the City of all financial records pertaining to the operations of the Project, including the reasonable cost of engaging the services of a private accounting firm to undertake such an audit; and
- d. The reasonable costs and expenses, including attorneys' fees, incurred by the City in enforcing this Phase II Contract or defending it against challenges brought by TMHLP. The city shall have the right to choose legal counsel, with the approval of TMHLP, which approval shall not be unreasonably denied or withheld.

13. **Successors/Assigns.**

- a. This Phase II Contract may be assigned or transferred during the Term specified in Section 2. However, if there is a "Sale/Transfer" of the Project for a use that is not consistent with section 42 of the IRS Code, i.e. the low income housing tax credit program, the City reserves the right to change the financial terms of this Phase II Contract if, in the determination of the Commissioner of Assessing, the tax benefits afforded TMHLP can be modified without putting the Project at risk. The Commissioner of Assessing shall have the right to request financial information, including but not limited to, Operating Pro-Forma projections for the Property, Feasibility Studies, Hold/Sell analysis conducted by either buyer or seller, any appraisals conducted by either the buyer or seller.
- b. If after due consideration of the information provided pursuant to section 8 the City determines that the viability of the Project is still dependent on maintaining the same percentage used for calculating the 6A Contract Payment, TMHLP's successor or assign shall be entitled to the same terms and conditions of this Phase II Contract. The successor or assign shall derive the benefits only for the time remaining in the Phase II Contract.

- c. If on the other hand, the City determines that the viability of the Project is not as dependent on the benefits afforded by this Phase II Contract, TMHLP's successor or assign shall be required to enter into good faith negotiations to determine the new percentage to be applied for calculating the 6A Contract Payment. TMHLP's failure to enter into good faith negotiations shall give the Commissioner of Assessing the right to unilaterally determine the new percentage to be used.
- d. TMHLP shall have the burden of notifying the City of the intended Sale/Transfer for a use that is not consistent with section 42 of the IRS Code, i.e. the low-income housing tax credit program. The City shall have 30 business days within which to respond, provided TMHLP shall have supplied pertinent Sale/Transfer information with its notice. If the City must request additional Sale/Transfer information, the 30 days shall commence upon the City receiving all pertinent Sale/Transfer information.

14. **Notices.** All notices required pursuant to this Phase II Contract shall be in writing and delivered by hand or mailed postage prepaid, by registered or certified mail, addressed as follows:

If to the City: City of Boston Assessing Department
One City Hall, Room 301
Boston, MA 0221
Attn: Commissioner of Assessing

If to TMHLP: Trinity Mattapan Heights Limited Partnership
40 Court Street, Suite 800
Boston, MA 02108
Attn: Mr. Patrick A. T. Lee

With a copy to: Katharine E. Bachman, Esquire
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109

A different address may be designated by each party by giving written notice to the other party. Any such notice shall be deemed given when so delivered by hand or, if so mailed, two (2) days after such notice is deposited with the U.S. Postal Service.

15. **Invalidity.** If any provision of this Phase II Contract or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Phase II Contract and the application of such provisions to other persons and circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

16. **Counterparts.** This Phase II Contract may be executed in counterparts, each of which when so executed and delivered shall be deemed an original, but such counterparts shall together constitute but one and the same instrument.

17. **Governing Law:** Notwithstanding anything to the contrary, this Phase II Contract shall be governed by the laws of the Commonwealth of Massachusetts and any suit, claim or action shall be brought in Suffolk County.

18. **Severability:** If any provision of this Phase II Contract or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Phase II Contract and the application of such provisions to other persons and circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

19. **Definitions.**

- a. **"Gross Income"** shall mean the aggregate of the gross rentals received by TMHLP from whatever source derived, including the occupants of the Project and all income received by the Owner pursuant to a Housing Assistance Payment Phase II Contract with the U.S. Department of Housing and Urban Development pursuant to Section 8 of the Housing Act of 1937, as amended, or any similar successor subsidy program.
- b. **"Overpayment"** shall include the following, to the extent that they exceed collectively the 6A Contract Payment: (i) any amounts paid by TMHLP to the City as real estate taxes pursuant to Chapter 59, as amended, or any successor statute, (ii) any amounts paid by TMHLP under Chapter 121A, Section 15; and (iii) the Excise Tax paid by TMHLP to DOR.
- c. **Sale/Transfer:** shall mean:
 - (i) any sale, transfer or assignment including, without limitation, sales, assignments and transfers by operation of law, by merger, or consolidation, or otherwise, but excluding (1) a foreclosure or deed in lieu of foreclosure and any subsequent sale by a foreclosing lender (or its affiliate) to a third party not affiliated with TMHLP, and (2) any such sale, transfer or assignment to an affiliate of TMHLP; and
 - (ii) Any transfer in a single transaction or series of related transactions of fifty (50%) percent or more of the direct legal or beneficial ownership in TMHLP; and
 - (iii) in the case of any entity that owns fifty (50%) percent or more of the direct legal or beneficial ownership in TMHLP as its only material investment (other than cash and cash equivalents), any transfer in a single transaction or series of related transactions of the direct legal or beneficial ownership in such entity that causes an indirect transfer of fifty (50%) percent or more of the legal or beneficial ownership in TMHLP.

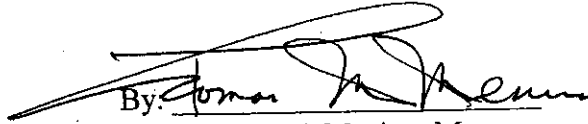
A party shall be considered an "affiliate" of or "affiliated" with TMHLP if such party (i) in the case of any entity, any partner, shareholder, member or other owner of such entity, provided that such partner, shareholder, member or other owner owns, directly or indirectly, at least twenty (20%) percent of the legal or beneficial ownership of such entity, and (ii) any other party which is a parent, a subsidiary or a subsidiary of a parent or owner with respect to such party or with respect to one or more of the persons referred to in the preceding clause (i).

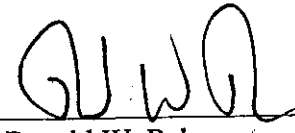
20. **Headings.** The headings and captions of the paragraphs and sections of this Phase II Contract are not to be considered a part of it and shall not be used to interpret, define, or limit the provisions hereof.

[Signature Page follows.]

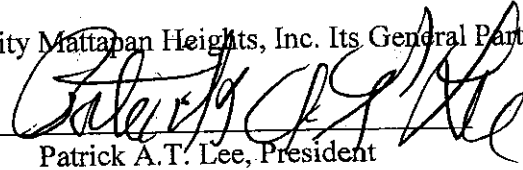
EXECUTED as a sealed instrument the day and year first above written.

CITY OF BOSTON

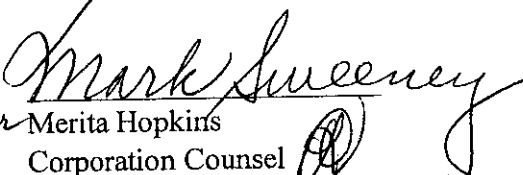
By: 
Thomas M. Menino, Mayor

By: 
Ronald W. Rakow,
Commissioner of Assessing

TRINITY MATTAPAN HEIGHTS LIMITED
PARTNERSHIP

By: Trinity Mattapan Heights, Inc. Its General Partner
By: 
Patrick A.T. Lee, President

APPROVED AS TO FORM:

By: 
for Merita Hopkins
Corporation Counsel
City of Boston 